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[*Thompson v. Tennessee Valley Authority*](#), 89-ERA-14 (ALJ Oct. 19, 1990)

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U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, Ohio 45202

DATE: October 19, 1990

CASE NO: 89-ERA-00014

IN THE MATTER OF

JAMES A. THOMPSON
Plaintiff

v.

TENNESSEE VALLEY AUTHORITY
Respondent

W.P. BOONE DOUGHERTY, Esq.
For the Plaintiff

BRENT R. MARQUAND, Esq.
For the Respondent

BEFORE:

Richard E. Huddleston
Administrative Law Judge

RECOMMENDED DECISION

This proceeding arises under § 210 of the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. § 5851 (1982), and the implementing regulations at 29 C.F.R. Part 24. The ERA in § 5851(a), prohibits a Nuclear Regulatory Commission ("NRC") licensee from discharging or otherwise discriminating against an employee who has engaged in protected activities as set forth in the Act.

A complaint was filed by James A. Thompson against the Tennessee Valley Authority (TVA) on October 13, 1988. Mr. Thompson alleges that he was terminated in retaliation for statements made to a Department of Labor Representative (DOL) who was investigating the ERA complaints filed by two

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other TVA employees, Ann Harris and Walt Wallace. The complaint was investigated by the Department of Labor ("DOL"), and a finding favorable to Mr. Thompson was made on December 16, 1988, PX 12).¹ By telegram on December 20, 1988, the Respondent, TVA, timely requested a formal hearing before an Administrative Law Judge (DX 8).

This case was assigned to this Administrative Law Judge on December 22, 1988. By telephone calls on December 22 and 23, 1988, Counsel for both parties advised that additional time was necessary to prepare for a hearing. On January 13, 1989 (JX 2), the parties waived the time limitations set out in 29 C.F.R. Part 24. By telephone conference conducted on February 10, 1989, the parties agreed to be ready for hearing on March 29, 1989. By notice issued February 15, 1989, a formal hearing was scheduled for March 29, 30, and 31, 1989. The formal hearing was conducted on March 29, 30, and 31, 1989, in Knoxville, Tennessee. Additional testimony was taken in Cincinnati, Ohio, on May 2, 1989, for a witness who was previously unavailable, by agreement of the parties. Both parties have filed post-hearing briefs.

The record upon which this case is decided consists of Plaintiff's Exhibits 1 through 13; Defendant's Exhibits 1 and 3 through 9; Joint Exhibits 1 and 2 (all of which were admitted at the hearing); and the Transcript of testimony. Additionally, I have marked for identification, the Plaintiff's brief as PX 14 and the Defendant's brief as DX 10.

STIPULATIONS²

1. Plaintiff is James A. Thompson, a former employee of the Tennessee Valley Authority (TVA). TVA is an employer subject to § 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1982) (Act). Plaintiff engaged in an activity protected by the Act when he was interviewed by an investigator from the United States Department of Labor on July 29, 1988, on claims of discrimination filed under the Act by Walter H. Wallace and Ann Harris.

2. TVA has a number of schedules under which its white-collar work force is classified. The M or Management and Specialist, schedule is pertinent to this case. Positions in the M-schedule are placed at grade levels which run from M-1 to M-13. As a general rule, the higher the grade level, the higher the pay. TVA considers positions at grade levels M-8 and above as senior management positions.

3. Plaintiff is a high school graduate with four additional years of

technical training. Prior to coming to TVA, he had 35 years of experience in the construction industry, most of which involved supervision of major construction projects, including power plant construction, and 20 years of supervisory and construction experience in the nuclear industry, which included approximately four and one-half years as the site manager at the South Texas Nuclear Project for Brown & Root and EBASCO. At the time he came to TVA in March 1987, he had been self-employed for about a year in Florida.

4. Plaintiff was first employed by TVA effective March 18, 1987, as Assistant Project Manager over Unit 2 at TVA's Watts Bar Nuclear Plant (Watts Bar). He worked in that capacity until July 13, 1987, when his appointment as Construction Manager, M-8, at Watts Bar was effective. As Construction Manager, he was responsible for managing construction activities at Watts Bar Unit 2 and, after early January 1988, Unit 1 as well.

5. Prior to the early 1988 reorganization, the Construction Engineer, the General Construction Superintendent, and the Chief, Management Services, reported to the Construction Manager. The early 1988 reorganization added the Manager, Modifications Group, to the managers who reported directly to the Construction Manager.

6. The Construction Manager reported directly to the Director of Construction (subsequently known as the Director of Nuclear Construction and the Vice President, Nuclear Construction). Robert A. Pedde served as Acting Director of Construction from at least October 1986 until February 1988. Brian McCullough served as Acting Director of Nuclear Construction in February, March, and early April 1988. William R. Brown, Jr., served as Director of Nuclear Construction and Vice President, Nuclear Construction, from April 11, 1988, at least until after the Plaintiff's termination. The Construction Manager also reported indirectly on a "dotted-line" or "matrix" basis to the Project Manager at Watts Bar until the position of Project Manager was abolished in January 1988. At that time, the Watts Bar Site Director assumed many of the duties of the Project Manager including the responsibilities with regard to the Construction Manager. Mr. Pedde served as Project Manager from February 1986 until January 1988. From January 1988 until May 1988, he served as Deputy Site Director at Watts Bar. From May 1988 until the present, Mr. Pedde has been the Watts Bar Site Director.

7. Throughout 1987 and until February 1988, Mr. McCullough served as advisor to the Director of Construction. In April 1988, he resumed this

position until he left TVA in mid-September 1988. Mr. McCullough is an employee of Bechtel North American Power Corporation (Bechtel) and worked for TVA under a contract between TVA and Bechtel.

8. Sometime in February 1988, Stephen P. Stagnolia became the Manager, Modifications Group, and remained in that position for the time pertinent to this case; Floyd Smith was the Construction Engineer until June 1988; John D. Porch was the General Construction Superintendent during the time pertinent to this case; and Don C. Knight became the Chief, Management Services, from and after January 1988.

9. In December 1987, Plaintiff received a performance appraisal of "solid performer" for the period from March 1987 to September 30, 1987. "Solid performer" is deemed to be a good rating at TVA.

10. Plaintiff was notified verbally that he would be terminated in a telephone conversation with Mr. Brown on the evening of August 10, 1988. Mr. Brown confirmed this information in a meeting with Plaintiff on August 11, 1988, in Mr. Brown's office. Mr. Brown offered Plaintiff the opportunity to resign, which Plaintiff later declined. By memorandum dated August 18, 1988, Mr. Brown terminated Plaintiff's employment effective September 18, 1988.

11. Plaintiff made timely contact with DOL about his termination.

ISSUE

1. Whether the Plaintiff was terminated by TVA because of his participation in a § 210 Department of Labor investigation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Plaintiff bears the burden of proof that he has been unlawfully discriminated against with respect to the terms of his employment as a result of engaging in activities which are protected under the Act. In order to establish a *prima facie* case of discrimination under the ERA, the Plaintiff must show, by a preponderance of the evidence, that TVA is an employer subject to the Act; that he was an employee of TVA, under the Act; that he was discharged or otherwise discriminated against with respect to the terms, conditions, or privileges of his employment; that he engaged in activity protected by the ERA; and that his termination was motivated, at least in part, by his protected activity.³

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It is not disputed that TVA, as a licensee of the Nuclear Regulatory Commission, is an employer subject to the Act; that James Thompson was employed by TVA; that he was terminated from employment by Mr. William R. Brown, Jr., Director of Nuclear Construction and Vice President, Nuclear Construction, on August 18, 1988, effective September 18, 1988, after declining the opportunity to resign; and that the Plaintiff engaged in an activity protected by the Act when he was interviewed by an investigator from the United States Department of Labor on July 29, 1988, on claims of discrimination filed under the Act by Walter H. Wallace and Ann Harris.⁴ Thus, it must

be determined whether the preponderance of the evidence establishes that his termination was motivated, at least in part, by his protected activity. To prove his case, the Plaintiff offered considerable evidence relating to the § 210 complaints of Walt Wallace and Ann Harris. This evidence was presumably offered to establish the magnitude of the problems uncovered by the activities of the individuals working within the Electrical Engineering Unit in identifying items which related to nuclear safety concerns at the Watts Bar Nuclear Plant.

Walt Wallace testified that he was the supervisor of a unit which was very extensively involved in identifying SCR'S, NCR'S, and CAQ'S. An SCR is a "significant condition report"; an NCR is a "non-conforming condition report"; a CAQR is a "condition adverse to quality report" (Tr. 24). All of these are concerns which can only be written as to a nuclear safety concern, 98 percent of which directly affect the licensing of a plant by the NRC (Tr. 26). He stated that most of the time he had a group of five or six people specifically working on CAQ'S, NCR'S, or SCR'S, with Ann Harris, who had filed an ERA complaint in May or June 1988, as group leader (Tr. 27). Some of these safety related issues were ones that had been identified as much as eight to ten years before, but had never been resolved (Tr. 28). Thus, some were issues identified by others than Walt Wallace's group, and that his group identified approximately 22 or 23 issues (Tr. 29). Mr. Wallace testified that, "We knew we had a problem, but we did not know the quantity that we had in the field, but the man hours alone just to go out and find out what the problem really, was over three million man hours"; which would cost the TVA roughly \$26.00 per man hour (Tr. 30).

Wallace testified that Ann Harris was the M-1 in charge of the special projects group, dealing with the identification and developing of corrective measures for the safety related issues (Tr. 32). Due to restraints on construction, there was an administrative hold on all cable pulling, which was placed by David Lake, the Construction Manager who preceded James Thompson (Tr. 32). There was also a design hold on all conduit supports which essentially shut construction work down, and that the CAQ'S, NCR'S,

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and SCR's at some point had to be resolved before the plant could be licensed (Tr. 33).

After the group had identified the twenty something issues, Wallace carried a list of them to Mr. Cofield, and was told to estimate the man hours needed, so that it could be presented to management. Wallace said that when they saw the duration of the work involved, they panicked (Tr 33), because they could see that something had to be done or the plant would not last in the 90's (Tr. 34).

However, even accepting that the unresolved problems uncovered by the Electrical Engineering Unit were of great magnitude with respect to the future licensing of the Watts Bar plant, it is difficult to relate such activities to the termination of this Plaintiff, the Construction Manager.

As indicated, the Plaintiff alleges that he was terminated in retaliation for **statements made to a Department of Labor Representative (DOL)** who was investigating ERA complaints filed by two other TVA employees, Ann Harris and Walt Wallace. The Respondent argues that Mr. Brown did not even know that the Plaintiff had been interviewed by DOL prior to his making his decision to terminate the Plaintiff; and argues that no other evidence to the contrary was introduced.⁵ Thus, it is argued that the complaint must fail, as the Plaintiff did not establish that Mr. Brown, the individual who terminated Mr. Thompson, had knowledge of the protected activity.

The Plaintiff has argued that TVA's effort to try to isolate Mr. Brown from Mr. Pedde and Mr. Brown's termination of Mr. Thompson is "far-fetched." Plaintiff contends that there is a sufficient connection in the evidence between Brown and Pedde to allow an inference that Pedde and Brown were directly involved in the decision to terminate Mr. Thompson.⁶

The Plaintiff has not argued, and I find, that there is no direct evidence in the record that Mr. Brown was aware that the Plaintiff had given testimony to the Department of Labor prior to the decision to terminate him. Mr. Brown testified that at the time he decided to terminate Mr. Thompson, he had no knowledge that Mr. Thompson had spoken to or had been interviewed by a Department of Labor investigator, and had no knowledge of what he may have told the investigator (Tr. 951 and 1015). Further, Mr. Pedde denied having told Mr. Brown that either Mr. Thompson or Mr. Smith had been interviewed by Ross Beavers of the DOL (Pedde Tr. 119). Mr. McCullough also denied any knowledge that Jim Thompson had made a statement to the DOL investigator that Pedde had said Walt Wallace lied to him (DX 7, p. 47). Although it is argued by the Plaintiff that the testimony of Mr. Brown, Mr. Pedde, and Mr.

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McCullough is not credible, such is not sufficient, alone, to establish that Mr. Brown was aware of the Plaintiff's statement to Mr. Beavers.

Ann Harris testified that in a conversation with Mr. Brown at his office, she advised him of the facts concerning her removal and Walt Wallace's removal from the Electrical Engineering Unit for alleged poor performance. She states that he responded by saying "Ann, that's a whistle blower. That's not right. That's against the law." (Tr. 119). When asked whether he recalled Ms. Harris talking to him about an allegation concerning Robert Pedde allegedly saying that a supervisor had lied to Mr. Pedde, Mr. Brown responded, "No, I don't." (Tr. 874, 875). Brown again did not recall any conversation with Ann Harris, that Mr. Pedde had been accused by Walt (Wallace) of saying that Walt had lied to him (Tr. 972). He also indicated that he would not have told anyone that anything was a whistle blower issue, as problems should be resolved within TVA (Tr. 974). Thus, he had no recollection of such a conversation with Ann Harris (Tr. 975). However, it is not clear from Ann Harris' testimony what she specifically told Mr. Brown, as she says she advised him of the facts concerning their removal. Thus, I find

that this is not clearly an inconsistency between the testimony of Mr. Brown and Ms. Harris. In any event, such does not establish that Mr. Brown knew of Mr. Thompson's testimony to DOL prior to his decision to terminate him.

There is no other evidence in the record which directly addresses the issue of whether Mr. Brown knew of the Plaintiff's testimony to the DOL. As such I find that the Plaintiff has failed to establish that Mr. Brown was aware of the Plaintiff's testimony to DOL prior to his decision to terminate him.

However, the Plaintiff has also argued that there is a sufficient connection established between Mr. Brown and Mr. Pedde to allow the inference that Mr. Brown and Mr. Pedde were both involved in the decision to terminate Mr. Thompson. Thus, the Plaintiff would apparently argue, although such is not directly stated, that if it is established that Mr. Pedde knew of the Plaintiff's testimony to DOL, such knowledge should be imputed to Mr. Brown.

Robert Pedde testified that in about January 1988 he became the Deputy Site Director at Watts Bar, and then in May became the Site Director (Pedde Tr. 6).⁷ At that time, Mr. Thompson was "matrixed" to him as "construction was matrixed into the site at that time." Thus, he testified that he had no authority to terminate Mr. Thompson or to continue him in employment (Pedde Tr. 9). On direct examination Pedde testified that he was aware that Mr.

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Thompson probably would be interviewed by a DOL investigator on the complaint filed by Walter Wallace (Pedde Tr. 36). However he says that he had no knowledge of what he told the investigator, and denied having any role in the decision to terminate Mr. Thompson. Regarding whether Mr. Brown ever asked for his opinion on retaining or terminating Mr. Thompson, he testified that, "He never asked my opinion." Mr. Pedde also denied any role in drafting Plaintiff's Exhibit 1, the termination document (Pedde Tr. 37).

Pedde states that in a conversation with Floyd Smith, he was told that he (Smith) was to be interviewed by Mr. Beavers, and that he was going to have to tell the truth, that he (Pedde) had made the statement. Pedde says he told him "that's fine, you need to tell the truth." (Pedde Tr. 68). When asked later if he had been told by Floyd Smith that Jim Thompson was going to be interviewed by the DOL investigator, Pedde responded, "No, sir, that is incorrect. Floyd told me he was going to be interviewed." (Pedde Tr. 93). He was later asked if he recalled Floyd Smith telling him that he (Smith) and Thompson had discussed the matter, and that Jim Thompson had some concerns about it because he was going to have to tell the truth about it. Pedde responded that, "No, sir, I don't believe Floyd told me that." (Pedde Tr. 95). Later he unequivocally denied being told by Smith that Thompson was going to be interviewed by Ross Beavers (Pedde Tr. 96).

Floyd Smith testified that for the period of March 1987 through August 1988, he was Construction Engineer at Watts Bar Nuclear Plant (Tr. 435). Smith testified that in a meeting with Mr. Pedde and Mr. Thompson in about October or November 1987, Mr. Pedde made the statement to he and Mr. Thompson that Walt Wallace had lied to him (Tr. 445). Smith recalled a time in June 1988 that Mr. Thompson called him out of a training meeting and told him that Ross Beavers was there and was going to interview him (Smith) (Tr. 448). Smith also recalled that Mr. Thompson told him "more than once, maybe a couple of times" that he was concerned about having to tell the DOL investigator that Mr. Pedde had made the statement that Walt Wallace had lied to him (Tr. 449). However, Mr. Smith denied that such was a concern of his (Smith's) (Tr. 450). Regarding whether Mr. Thompson asked Smith if he was going to tell Mr. Pedde about the discussion, Mr. Smith states, "Not exactly in those terms. I remember Jim being concerned about talking to Pedde about it and either I volunteered or we talked about it and decided that I would go talk to him." (Tr. 452).

Mr. Smith testified that he did in fact talk to Mr. Pedde, and that,

The best I can recall when I talked to Pedde it was before either one of us had talked to the DOL investigator ... And I told him that Jim was concerned about having to tell the investigator that Pedde had said that

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Walt had lied to him in a meeting. Mr. Pedde's response, as I recall it, was, you know, 'So what? I'm going to have to tell him that, too.' or 'I have told him that, too.' That was the truth.

(Tr. 453).

Thus there is a contradiction between the testimony of Robert Pedde and Floyd Smith, as to whether Smith relayed Mr. Thompson's concerns about being interviewed by DOL and about how that would affect Mr. Pedde.

Mr. Allan Gentry testified that he was employed by TVA in Employee Concerns, and on two occasions interviewed Mr. Pedde regarding the complaint of Walt Wallace. Mr. Gentry stated that during the second of these interviews, Mr. Pedde denied having said that Walt Wallace lied to him (Tr. 527, 528). Gentry testified that when Mr. Beavers came on site to interview people, it was fairly general knowledge as to who would be interviewed. He also responded that it was a hot item of information and that, "I think so and I think DOL's presence on the site made a lot of people nervous. I know the people I talked to regarding coming over for interviews were very nervous about it." (Tr. 530).

Similarly, the Plaintiff testified that the subject of the Walt Wallace and Ann Harris DOL complaints was "pretty general knowledge" and a "hot topic of conversation" around the Watts Bar site (Tr. 251). Ann Harris stated that when Ross Beavers was investigating the two complaints, he talked openly about who and when he was going to

be interviewing. She says she didn't know the specific day that Mr. Thompson was being interviewed, but knew that it was to happen that week (Tr. 106).

Upon considering this evidence, I find that it is clear that Robert Pedde knew that the Plaintiff probably would be interviewed by DOL, subsequently knew, in fact, that he had been interviewed by DOL. I also find that it is highly probable that Mr. Pedde knew that Mr. Thompson would relate to DOL that he heard Mr. Pedde make the statement that Walt Wallace had lied to him. However, such finding falls short of establishing that the testimony of Mr. Thompson caused Mr. Pedde to have Mr. Thompson terminated from employment. Indeed, it is undisputed that Mr. Pedde knew that Floyd Smith was going to, and gave, the same statement to the DOL investigator.

Mr. Brown testified that his initial input from Mr. Pedde was between April 11th and May 4th (1988), in a call from Pedde that basically said that,

Jim and the troops down here are an embarrassment to your division. The

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Nuclear Engineering group is even out-performing you. And following that up in what capacity, how, what's the problem. Basically, it was in their ability to execute the C.A.Q.R.'s meet the schedule, do the coordination necessary to get all those things cleared up.

(Tr. 877).

Brown testified that during the pertinent period of time, Mr. Pedde was either Director of Nuclear Construction, Assistant Site Director, Site Director or Project Manager (Tr. 988). He was asked by Counsel for the Plaintiff, "Would you agree with me that Mr. Pedde could effectively recommend to you disciplinary action on behalf of a manager below him?" To which Brown responded "No." (Tr. 989). However, he did state that Mr. Pedde could make input relative to a manager's performance (Tr. 990). He was then asked, "...but is it not correct that Mr. Pedde, in the dozen phone calls that you- all had prior to August 10th, 1988, in essence, was very critical of Mr. Thompson's performance and recommended that he be terminated?" Brown responded, "Mr. Pedde, to my knowledge, never recommended that Mr. Thompson be terminated. We only had, I believe, one conversation where he suggested that we make a change." (Tr. 990).

Brown denied that the language of the August 18, 1988, termination letter (DX 5), about losing confidence were actually the words supplied to him by Mr. Pedde (Tr. 990). However, when questioned about the specific language of the termination letter, Mr. Brown was asked, "So, really, in essence, what Mr. Pedde was saying to you was that he lost all confidence in Mr. Thompson?" To which, Brown responded, "That's right." (Tr. 990). Defendant's Exhibit 5 (termination letter) in the first "bullet" paragraph states, "Nuclear Construction's client at Watts Bar, the Site Director, has lost all confidence in his ability to provide effective construction leadership to meet the goals and objectives of the Watts Bar site." (DX 5, p. 1).

Brown testified that the reference to "the Site Director" in the above is a reference to Bob Pedde (Tr. 991).

Mr. Brown was asked if this input from Mr. Pedde was really the primary input that he received in making the decision to terminate. He responded, "Yes. I won't say the primary input. I would say the senior individual that I got input from relative to that issue." He was then asked if he considered this input of the most importance. To which he responded, "That's right. And had I accepted only that input, I would have probably terminated Jim two or three or four weeks earlier than I did." (Tr. 992).

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Brown was asked if Mr. Pedde provided any objective documentation or evidence that Mr. Thompson was not performing proficiently at Watts Bar. He indicated that the only feedback was that Pedde showed him some TROI reports where the issues were rescheduled out to "a year, year and a half." (Tr. 994). However, he acknowledged that some of those TROI items possibly involved "maybe more than a million manhours to resolve and millions of dollars to resolve." (Tr. 994).

Brown was questioned regarding bullet item 3 of DX 5 (Thompson termination letter) (Tr. 1004), which provides, "His lack of involvement and follow-up in at least two personnel issues had the potential to cost TVA approximately \$225,000 and other concessions."

Specifically, he was asked if these two personnel issues referred to the claims of Ann Harris and Walt Wallace. Brown responded, "I think that's correct." (Tr. 1004). Brown testified that he had detailed knowledge of Ms. Harris' complaint, but only knew of Mr. Wallace's complaint. However, he later stated that shortly after the complaints were filed around May 6th, May 10th, 1988, he read the complaints (Tr. 1005). He then was asked, "And in those letters, is it not a fact that it was -- the allegation was presented that Mr. Pedde has said Walt Wallace lied to him?" To which he responded, "I think that's what it says." (Tr. 1006).

In considering this evidence, I find that the Plaintiff has established that Mr. Pedde was the senior manager whose input Mr. Brown considered in making the decision to terminate Mr. Thompson. I also find that Mr. Pedde, on at least one occasion, recommended the termination of Mr. Thompson. I also find that the Plaintiff has established that Mr. Brown knew of the Walt Wallace and Ann Harris complaints, including the allegation that Mr. Pedde had stated that Walt Wallace lied to him in a meeting. However, I find that this evidence is not sufficient to establish that Mr. Brown knew that Mr. Thompson had testified to a DOL representative about the Walt Wallace complaint, or that Mr. Brown knew that Mr. Thompson had told the DOL of the "Walt Wallace lied statement." Further, I find that there is no evidence of animosity on the part of Mr. Pedde **toward Jim Thompson** for having testified to such. Thus, I find that there is no evidence to establish that Mr. Pedde's input to Mr. Brown in making the decision to

terminate Mr. Thompson resulted in improper animus for Mr. Thompson's testimony to DOL.

For these reasons, I find that the Plaintiff has failed to establish a *prima facie* case, that his termination was the result, to any degree, of his testimony to the Department of Labor. As such, the complaint must be dismissed.

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Even if it is assumed that the Plaintiff had established that his termination was the result, to any degree, of the testimony he gave to the DOL investigator, I also find that TVA has articulated a legitimate non-discriminatory reason for his termination.

The Plaintiff was employed by TVA in a senior management position, and as such TVA must be given wide latitude in its decision to retain his services. Mr. Brown testified that during the period of July 1987 to April 11, 1988, at one time or other he talked to Mr. Stagnolia, Modifications Manager, Mr. Floyd Smith, Construction Engineer, Mr. John Porch, Construction Superintendent, and Mr. Knight, head of Project Management Services, about Mr. Thompson (Tr. 866- 869). Specifically, he talked to Floyd Smith sometime in January-February 1988, when there was a reorganization or a realignment of the organization.

Brown also testified that he had other sources of information regarding Mr. Thompson's performance, including the Site Director, Mr. Pedde. He stated he had the direct reports from Mr. Thompson. By this statement he does not appear to have been referring to direct contact with Mr. Thompson, but to direct contact with the individuals who reported to Mr. Thompson, such as Mr. Stagnolia, Mr. Porch, and a Mr. Huffaker (Tr. 875). In addition, Brown says he had discussed Mr. Thompson's performance with Benny Bounds, Project Engineer for Nuclear Engineering, as well as Dave Stewart, Assistant to the Site Director (Pedde) (Tr. 876).

Mr. Brown also testified that he spoke with Jim Thompson and Mr. McCullough at Watts Bar at some time during the last of April or the first week of May. He indicates the discussion related to the detail that Mr. Thompson was required to provide in the meetings, and that he suggested to Mr. Thompson that he provide to him on a weekly basis the report he would give on Tuesday at the Site Director's status meeting (Tr. 878). Brown says that two or three weeks passed, and he had not received a report, so he called Mr. Stewart and asked him to send a copy of what Mr. Thompson had presented in the meeting that week (Tr. 878). When he received the report from Stewart, Brown says he reviewed it, made marginal notes, and sent it back to Mr. Thompson. Brown says his notes were, "Jim, I haven't seen one of these. This is not too hot. How about getting me a report?" Mr. Brown says that Thompson later started providing him with copies of his report on a weekly basis (Tr. 879).

Mr. Brown states that he decided to terminate Mr. Thompson because, "Basically, it was a result of the continuing observation, input, and ineffective leadership that I had observed from the time I came back into the Division of Construction." (Tr. 950).

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On cross-examination Brown testified that he has a practice of writing "down just about everything" and on occasion keeps a daily diary (Tr. 956). However, he testified that there is not a single document criticizing Thompson's performance (Tr. 957). Mr. Brown stated that with senior management it was his practice not to document poor performance, as they served at the pleasure of the Board (Get Tr. cite and Tr. 958). Mr. Brown stated that he did make some handwritten notes in his daily planner, which on July 7, 1988, says, "Jim Thompson, discussed Rainbow Report, exception report, Watts Bar TROI needs, sending people to Sequoyah, sending people further impact Watts Bar items. Jim Thompson must get personally involved himself" (Tr. 959). He then testified that he has a pretty good work habit in this context of noting in his daily planner what he does every day (Tr. 961). This is true even if he went off site and down to Watts Bar (Tr. 962).

Brown says the "Rainbow Report" is the exception report to the NRC, and explained that if further people were taken from Mr. Thompson and sent to Sequoyah, such will further impact Watts Bar unit items (Tr. 962). Brown acknowledged that the statement "Jim Thompson must get personally involved himself" was intended not as a criticism of Thompson, but what he was really saying was "Jim, get involved so Admiral White doesn't put heat on me, or Chairman Runyan doesn't put heat on me." (Tr. 963).

The termination document itself, DX 5 at bullet 5, provides as one of the grounds for termination of Mr. Thompson, that, "After discussions and counseling by either me or my contract advisor, Brian McCullough, on specific problems, he had failed to take the recommended follow-up actions."

In considering this evidence, I find that the evidence establishes that there was clearly a disagreement between Mr. Thompson and Mr. Pedde and Mr. Brown regarding the degree of involvement that he, as a manager, should give to the details of his work. Mr. Brown was of the opinion that his management should be significantly more involved in the specific projects within his work area. Mr. Thompson was of the view that such was "Micro management" and that his approach was to delegate to his subordinates and let them do his job. Evidence was submitted that perhaps the detail required of Mr. Thompson was unreasonable in light of the depletion of his staff (re-assigned to the Sequoyah plant).

However, I find that whether the detail required of Mr. Thompson was reasonable or not is a decision which must be left to the management of TVA. As such, I find that even if the Plaintiff had established that his termination was motivated to some slight degree by his testimony to DOL, TVA

has articulated a legitimate non-discriminatory business reason for his termination. Therefore, the complaint must be dismissed.

ORDER

It is recommended that the Complaint of Mr. James Thompson against the Tennessee Valley Authority be dismissed.

Issued at Cincinnati, Ohio, this the 19th day of October, 1990.

Richard E. Huddleston
Administrative Law Judge

[ENDNOTES]

¹In this decision, "PX" refers to the Plaintiff's Exhibits; "DX" refers to the Defendant's or Respondent's Exhibits; "Tr." refers to the transcript of the hearing; and "IX" refers to the Joint Exhibits.

²Joint Exhibit 1.

³See, generally, *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983); *Makowiak v. University Nuclear Systems, inc.*, 735 F.2d 1149 (9th Cir. 1984).

⁴Joint Exhibit 1.

⁵Respondent's brief at page 2.

⁶Plaintiff's brief at page 6.

⁷Mr. Pedde testified on May 2, 1989, in Cincinnati, Ohio. The transcript of his testimony is not numbered consecutively with the other witnesses in this case. References to his testimony will be referred to as "Pedde Tr.".